

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RODNEY ALVARADO and JASON
TOWNSEND, individually and
on behalf of all others
similarly situated,

Plaintiffs,

v.

BANK OF AMERICA, N.A.,
Defendant.

NO. CIV. S-08-2862 LKK/DAD

O R D E R

Plaintiffs have brought suit on behalf of themselves and members of a putative class alleging that defendant Bank of America has an unlawful practice that results in it improperly benefitting from funds in customers' checking accounts. Pending before the court is defendant's motion to transfer, based on judge-shopping, or to dismiss some causes of action under Federal Rule 12(b)(6). The court resolves the motion on the papers and grants defendant's motion to transfer.

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I. BACKGROUND

A. Allegations of the Complaint¹

Plaintiffs Jason Townsend and Rodney Alvarado allege that they are defendant's customers, specifically that they have interest-bearing checking accounts with defendant and use defendant's on-line banking services. Among other services, Bank of America will write checks on customers' behalf as part of its bill payment services. According to plaintiffs, defendant represents that this service is free and that it will not withdraw the funds from the customer's account until the check is presented by the payee for payment. Plaintiffs allege that, in fact, defendant withdraws the amount immediately upon creating the check, deposits the funds in its own account, and therefore earns interest on the funds in the time between the dates on which the check is written and on which the check is cashed. Based on these factual allegations, plaintiffs allege causes of action under California's Unfair Competition law and Consumer Legal Remedies Act and for breach of contract, conversion, breach of agency, and unjust enrichment.

B. Procedural History

Plaintiff Townsend filed a virtually identical complaint in the Northern District of California on November 12, 2008.² The

¹All allegations described herein are taken from the complaint and are taken as true for the purposes of this motion only.

²Defendant requests the court take judicial notice of the Complaint filed in the Northern District action and the docket of that case. A court may take judicial notice of a fact not subject to reasonable dispute, either because the fact is generally known within the territorial jurisdiction of the trial court or because

1 complaint is identical to the one filed in this court, except that
2 plaintiff Alvarado has been added to the complaint filed in this
3 court. In the complaint filed in the Northern District, plaintiff
4 alleged that venue there was proper "because Defendant does
5 substantial business in this District and a substantial part of the
6 events and losses described herein occurred, and continue to occur,
7 in this District." Req. for Judicial Notice, Ex. B ¶ 11. This venue
8 allegation is identical to that contained in the complaint filed
9 in this district. Compl. ¶ 12.

10 After the complaint was filed in the Northern District, the
11 docket there reflects that on November 19, 2008, Judge Marilyn
12 Patel recused herself. The case was reassigned on that date to
13 Judge William Alsup. On November 21, 2008, plaintiff Townsend
14 voluntarily dismissed the complaint.

15 On November 25, 2008, plaintiffs Townsend and Alvarado filed
16 suit in this court. As stated, the complaint is virtually identical
17 to that filed in the Northern District, including the venue
18 allegation. Plaintiff Alvarado is alleged to be a citizen of
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21 the fact is capable of accurate and ready determination from
22 sources whose accuracy cannot reasonably be questioned. Fed. R. Evid.
23 201(b). A court shall take judicial notice of a judicially
noticeable fact "if requested by a party and supplied with the
necessary information." Fed. R. Evid. 210(d).

24 Here, these documents are public documents whose contents the
25 court is able to accurately and readily determine. Defendant has
26 complied with Federal Rule of Evidence 201(d) by requesting
judicial notice and supplying the court with a copy of the
applicable sections of them. Therefore, the court takes judicial
notice of them.

1 California, residing in Stockton, California.³

2 II. STANDARDS

3 A. Standard for Dismissal for Judge-Shopping

4 A district court has inherent power to dismiss a case due to
5 judge-shopping as part of its power to sanction conduct that abuses
6 the judicial process. Hernandez v. City of El Monte, 138 F.3d 393
7 (9th Cir. 1998); see also Local Rule 83-123(d) ("An action may not
8 be dismissed and thereafter refiled for the purpose of obtaining
9 a different Judge or Magistrate Judge."). Being a harsh penalty,
10 however, dismissal should be used as a sanction in extreme
11 circumstances. Hernandez, 138 F.3d at 399, citing Ferdik v.
12 Bonzelet, 963 F.2d 1258, 1260 (9th Cir. 1992). In light of this,
13 a court may elect to transfer the case back to the original judge.
14 See, e.g., Vaquiera Tres Monjitas, Inc. v. Cubano, 341 F. Supp. 2d
15 69, 71-73 (D.P.R. 2004).

16 B. Standard for Dismissal Pursuant to Federal Rule of Civil 17 Procedure 12(b)(6)

18 In order to survive a motion to dismiss for failure to state
19 a claim, plaintiffs must allege "enough facts to state a claim to
20 relief that is plausible on its face." Bell Atlantic Corp. v.
21 Twombly, 550 U.S. 544, 569 (2007). While a complaint need not
22 plead "detailed factual allegations," the factual allegations it
23 does include "must be enough to raise a right to relief above the
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25 ³Plaintiff Townsend is alleged to be a citizen of California,
26 residing in Beverly Hills, California. See Compl. ¶ 8; Req. for
Judicial Notice Ex. B ¶ 7.

1 speculative level." Id. at 555.

2 The Supreme Court recently held that Federal Rule of Civil
3 Procedure 8(a)(2) requires a "showing" that the plaintiff is
4 entitled to relief, "rather than a blanket assertion" of
5 entitlement to relief. Id. at 555 n.3. Though such assertions may
6 provide a defendant with the requisite "fair notice" of the nature
7 of a plaintiff's claim, the Court opined that only factual
8 allegations can clarify the "grounds" on which that claim rests.
9 Id. "The pleading must contain something more. . . than . . . a
10 statement of facts that merely creates a suspicion [of] a legally
11 cognizable right of action." Id. at 555, quoting 5 Wright & Miller,
12 Federal Practice and Procedure, § 1216, pp. 235-36 (3d ed. 2004).⁴

13 On a motion to dismiss, the allegations of the complaint must
14 be accepted as true. See Cruz v. Beto, 405 U.S. 319, 322 (1972).
15 The court is bound to give the plaintiff the benefit of every
16 reasonable inference to be drawn from the "well-pleaded"
17 allegations of the complaint. See Retail Clerks Int'l Ass'n v.
18 Schermerhorn, 373 U.S. 746, 753 n.6 (1963). In general, the
19 complaint is construed favorably to the pleader. See Scheuer v.
20 Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by
21 Harlow v. Fitzgerald, 457 U.S. 800 (1982). Nevertheless, the court
22 does not accept as true unreasonable inferences or conclusory legal

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24 ⁴ The holding in Twombly explicitly abrogates the well
25 established holding in Conley v. Gibson that, "a complaint should
26 not be dismissed for failure to state a claim unless it appears
beyond doubt that the plaintiff can prove no set of facts in
support of his claim which would entitle him to relief." 355 U.S.
41, 45-46 (1957); Twombly, 550 U.S. at 560.

1 allegations cast in the form of factual allegations. W. Mining
2 Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

3 **III. ANALYSIS**

4 Defendant moves to have the case transferred to the Northern
5 District on the grounds that the suit was filed in this district
6 for the purpose of judge-shopping. Defendant alternatively moves
7 for dismissal of plaintiffs' third, fourth, fifth, and sixth causes
8 of action for failure to state a claim on which relief may be
9 granted under Rule 12(b)(6). Because the court grants the motion
10 to transfer, it need not reach the motion to dismiss.

11 The court has broad discretion to manage its docket,
12 particularly for the purpose of discouraging the abuse of judicial
13 process. See Hernandez, 138 F.3d at 399. Other courts have found
14 dismissal or transfer appropriate where there are circumstances
15 that cause the court to believe that a case is before it as a
16 result of judge-shopping. See, e.g., id.; Vaquiera Tres Monjitas,
17 341 F. Supp. 2d at 73. For example, in Hernandez, plaintiffs had
18 filed an action in federal district court and a month later filed
19 a substantially similar action in state court. Hernandez, 138 F.3d
20 at 396. The only difference between the actions was that the
21 parties' names appeared in a different order in the captions of the
22 cases. Id. The state court action was removed to federal court and
23 then related to the action that had been filed in federal court.
24 Id. The district court judge observed the similarities between the
25 cases and at a hearing on an order to show cause, asked the
26 plaintiffs' attorney why they had been filed in two different

1 courts. Id. at 397. The attorney explained that he had wanted to
2 take advantage of the jury selection procedures in state court, but
3 had also wanted to avail his client of the discovery advantages in
4 federal court. Id. He expressed that he had intended to dismiss the
5 action that had been filed in federal court. Id. The district court
6 dismissed both actions, concluding that plaintiff had engaged in
7 "blatant judge shopping." Id. at 397-98. The Ninth Circuit affirmed
8 this aspect of the court's ruling, holding that "the circumstances
9 presented could fairly support a determination" of judge-shopping.
10 Id. at 398. The court reversed the dismissal of the action,
11 however, finding that there was inadequate evidence that such a
12 harsh sanction was merited. Id.

13 In similar factual circumstances, the Vaquiera Tres Monjitas
14 court held that transfer back to the original judge was an
15 appropriate sanction. There, plaintiffs filed suit in district
16 court and the case was randomly assigned a particular judge. 341
17 F. Supp. 2d at 70. Shortly after filing, plaintiffs moved for a
18 preliminary injunction, which was denied. Id. Plaintiffs moved for
19 reconsideration of that ruling, which was also was denied. Id. The
20 next day, plaintiffs dismissed the suit. Id. at 71. Later that same
21 day, plaintiffs filed a substantially similar suit in the same
22 district; the only differences were the order of the plaintiffs'
23 names in the caption and the addition of a new cause of action. Id.

24 The court transferred the case back to the original judge,
25 finding that "the timing of Plaintiffs' actions lead [the court]
26 to the conclusion that they engaged in judge-shopping. . . . **We**

1 **cannot and will not condone this practice.”** Id. at 73 (emphasis in
2 original). The court also sanctioned plaintiffs’ counsel \$1,000
3 each, out of “concern for the integrity of the judiciary and the
4 public’s perception thereof.” Id. at 73. The Vaquiera Tres
5 Monjitas’ court’s holding resembles that of other courts when faced
6 with similar circumstantial evidence of judge-shopping. See, e.g.,
7 Zografos v. Qwest Commc’ns Corp., 225 F. Supp. 2d 1217 (D. Or.
8 2002) (dismissal for judge-shopping appropriate where same suit had
9 been filed, proceeded to the settlement stage, and then voluntarily
10 dismissed in another district); Smith v. Mt. Sinai Hosp., 1985 WL
11 561 (S.D.N.Y, Apr. 22, 1985), aff’d 857 F.2d 1461 (2d Cir. 1987)
12 (transfer to original judge appropriate where plaintiff had
13 dismissed and refiled an identical suit after, according to
14 defendant’s counsel, plaintiff’s counsel had stated she wished to
15 “get away from” the original judge, although plaintiff’s counsel
16 had filed an affidavit offering a different explanation).

17 Here, the timing of the events in the original suits is strong
18 indication that plaintiffs engaged in judge-shopping in filing the
19 instant suit. The suit in the Northern District was filed on
20 November 12, 2008, originally assigned to Judge Patel. A week later
21 she recused herself and the case was reassigned; two days after
22 that (a Friday) plaintiff dismissed his suit. The following Tuesday
23 plaintiffs filed an almost identical action in this court. This
24 sequence of events strongly suggests that it was Judge Patel’s
25 recusal that caused plaintiff to dismiss his suit and refile it in
26 this district.

1 Additionally, the complaint filed in this court gives no
2 indication why venue is more proper here than the Northern
3 District. The venue allegation in both complaints are identical,
4 with both alleging that defendant has significant contacts in the
5 district and that a substantial part of the events and losses
6 occurred in the district. See Req. for Judicial Notice, Ex. B ¶ 11;
7 Compl. ¶ 12. There is nothing to indicate that the allegation for
8 venue has a more compelling factual basis in the Eastern District
9 than the Northern District.

10 Although plaintiffs contend that plaintiff Alvarado did not
11 consent to be a representative plaintiff until after the original
12 complaint was filed and that the arguments maintaining venue in the
13 Eastern District were "much stronger" than those for asserting
14 venue in the Northern District, plaintiffs, perhaps tellingly,
15 offer no affidavits or other evidence to substantiate these
16 arguments. See Pls.'s Opp'n to Def.'s Mot. to Transfer at 6. Even
17 if they had, however, that alone would not justify denying
18 defendant's motion if other evidence suggests to the court that
19 plaintiffs have engaged in improper judge-shopping. See, e.g.,
20 Hernandez, 138 F.3d at 399 (plaintiff's counsel offered alternative
21 explanation at oral argument); Smith, 1985 WL 561 (plaintiff's
22 counsel offered an affidavit contradicting defendant's assertion
23 of judge-shopping). In light of the circumstantial evidence of
24 judge-shopping, the explanations offered in plaintiffs' opposition
25 brief simply do not appear credible.

26 Accordingly, the court finds that there is adequate evidence

1 to support the inference that plaintiffs engaged in improper judge-
2 shopping here. The court therefore grants defendant's motion to
3 transfer the case to the Northern District of California, to be
4 assigned to Judge Alsup.

5 **IV. CONCLUSION**

6 For the reasons stated herein, defendant's motion to transfer
7 is GRANTED. This action is TRANSFERRED to Judge William Alsup of
8 the Northern District of California. The Clerk is directed to close
9 the case.

10 IT IS SO ORDERED.

11 DATED: March 17, 2009.

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15 LAWRENCE K. KARLTON
16 SENIOR JUDGE
17 UNITED STATES DISTRICT COURT
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